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In the Supreme Court of the United States

OCTOBER TERM, 1975

No.

HARRAH'S CLUB,

Petitioner,

v.

RICHARD A. BERNHARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

The petitioner Harrah's Club respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of California entered on March 2, 1976, rehearing denied on April 22, 1976.

OPINIONS BELOW

The opinion of the Supreme Court of the State of California is officially reported at 16 Cal. 3d 313 and unofficially reported at 546 P. 2d 719; 128 Cal. Rptr. 215. A copy of the opinion appears in Appendix A hereto. The opinion of the Court of Appeal of the State of California in and for the Third Appellate District has been deleted from the official reports in accordance with California practice. It is unofficially reported at 117 Cal. Rptr. 351. A copy of the opinion appears in Appendix C hereto. No opinion was rendered by the Superior Court of the State of California in and for the County of Sacramento.

JURISDICTION

The judgment of the Supreme Court of the State of California was entered on March 2, 1976. A timely petition for rehearing was denied on April 22, 1976, and this petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether the Full Faith and Credit Clause of Article IV §1 of the United State Constitution, as implemented by 28 U.S.C. § 1738, requires state courts to articulate rules to justify the imposition of liability on foreign defendants in favor of forum residents.

2. Whether the California Supreme Court violated full faith and credit in purporting to regulate, for the benefit of Californians, conduct of foreign establishments within a sister state in disregard of sister-state law.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article IV § 1:

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

United States Code, Title 28 § 1738: State and Territorial Statutes and Judicial Proceedings: Full Faith and Credit

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

California Business and Professions Code § 25602: Sales to Drunkard or Intoxicated Persons

Every person who sells, furnishes, gives, or causes to be sold, furnished, or given away any alcoholic beverage to any habitual or common drunkard or to any obviously intoxicated person is guilty of a misdemeanor.

STATEMENT OF THE CASE

Petitioner Harrah's Club is a Nevada Corporation which owns and operates a hotel and casino in Reno, Nevada. Respondent, Richard A. Bernhard, a resident of the State of California, was injured when the 1955 Harley Davidson motorcycle he was riding collided with a 1961 Pontiac automobile owned by Fern Virginia Myers and Philip George Myers, a married couple, who were returning from a trip to Reno, Nevada to their home in California. The accident happened on July 25, 1971 on Highway 49 near Nevada City, California. Bernhard brought actions against Mr. and Mrs. Myers, as well as against Harrah's Club, in the Sacramento County Superior Court.

Bernhard's amended complaint contained the following pertinent allegations: Harrah's Club is doing business in California; Mr. and Mrs. Myers went to Nevada in response to its advertisements and solicitations to drink and gamble; Mr. and Mrs. Myers become obviously intoxicated but Harrah's Club employees nonetheless continued to furnish them drinks, thus rendering them more obviously intoxicated. The couple left the establishment incapable of driving safely and Fern Virginia Myers negligently, carelessly, and recklessly caused the accident. (R 17-28).

Mr. and Mrs. Myers failed to appear and are not parties to the subsequent appeals. Harrah's Club filed a general demurrer on the ground the complaint failed to state a cause of action under applicable Nevada common law. In opposing the demurrer Bernhard argued California law applied and the California Supreme Court had implied a civil remedy from a California

penal statute which prohibits supplying alcoholic beverages to obviously intoxicated persons. The trial court sustained the demurrer without leave to amend further and entered a judgment of dismissal.

Bernhard appealed to the California Court of Appeal, Third Appellate District, which reversed. The California Supreme Court then granted Harrah's Club's petition for a hearing and, in accordance with California practice, heard the case as one on appeal from the trial court. It also decided against Harrah's Club and subsequently denied a petition for rehearing.

Both of the California appellate courts concluded California law, which renders tavern keepers liable for torts committed by drunken patrons, rather than Nevada law, which does not provide for such liability, applied. Both courts premised this conclusion on the need to further California's interest in protecting Californians. The California Supreme Court conceded Nevada has a policy, propounded by the Nevada Supreme Court, of protecting hotels and tavern-owners against "ruinous exposure every time [they] pour a drink" and in avoiding "multiply[ing] litigation endlessly in a claim-conscious society." [Appendix A-9] Using the terminology of the so-called governmental interest approach to choice of law, the court therefore found a "true conflict" between Nevada's interest in protecting its hotel and tavern owners and California's interest in protecting Californians from injuries resulting from the excessive use of alcohol. To resolve this conflict in California's favor the court invoked a "comparative impairment" doctrine. According to this doctrine the court in a "true conflict" situation applies the law of the state

whose interest would be more impaired if its policy were subordinated to the policy of the other state. The California Supreme Court reasoned California cannot effectuate its policy of preventing the sale of alcohol to intoxicated persons if the California tort rule would not also reach out-state establishments. Unwilling to delineate the full extraterritorial sweep of the forum's tort rule, the court stated at least those foreign establishments who solicit the business of Californians must bear the brunt of dramshop liability to avoid a very significant impairment of California's policy. In contrast, Nevada's policies would not be significantly impaired by applying the California rule to such out-of-state defendants. Imposing liability would not create a new duty on Nevada establishments, because a Nevada penal statute already prohibits the sale of alcohol to obviously intoxicated persons. They would merely be subjected to an increased economic exposure, a foreseeable and coverable business expense.

In short, the California Supreme Court determined under the comparative impairment doctrine the California tort rule could be applied at least to certain classes of Nevada hotels and tavern keepers for injuries caused by their patrons, notwithstanding a Nevada policy to the contrary. In making this determination the Court, at least in part, erroneously relied on a Nevada criminal statute that had been previously repealed.

At each stage of the proceedings in the trial and appellate courts Harrah's Club raised the federal question sought to be reviewed. The briefs accompanying the demurrer to Bernhard's initial and the amended

complaints [R 13-15, 24-31], the reply brief in the intermediate appellate court [R 65-78], the petition for a hearing [R 79-98], and the petition for rehearing [R 155-174] all cite the Full Faith and Credit Clause of Article IV, § 1 of the United States Constitution, and Harrah's Club consistently maintained that application of California law to the facts alleged by Bernhard would violate this Constitutional provision. Neither the opinion of the intermediate appellate court nor that of the California Supreme Court, however, address this issue.

The decision of the California Supreme Court has legal and economic implications that transcend the importance of this particular case. Financially, the imposition of California standards on Nevada establishments has had an immediate, substantial impact on the insurance premiums paid by Nevada establishments, large and small, wherever they may be doing business in their home state. Thus, the California decision imposes a direct burden on Nevada's hotel and casino business, an industry fundamental to the very survival of the state. Legally, this decision marks a further notch in the continuing erosion of full faith and credit and interstate comity in the wake of the so-called "conflicts revolution."

REASONS FOR GRANTING THE WRIT

I. THE CALIFORNIA CHOICE-OF-LAW APPROACH APPLIED IN THIS CASE TO IMPOSE LIABILITY ON A SISTER-STATE DEFENDANT FAILS TO MEET THE STANDARDS OF INTERSTATE COMITY MANDATED BY THE FULL FAITH AND CREDIT CLAUSE.

(1) In the instant case the California Supreme Court applied California law to hold a Nevada corporation liable for conduct in Nevada which, according to Nevada law, would entail no liability. The case therefore poses the question to what extent the courts of one state must defer to the laws of another. This question, central in a federal system, has become increasingly doubtful. Current state practice and pronouncements by this Court suggests that little, if any, faith and credit is due to sister-state law, so that the constitutional mandate has become a dead letter.

In marked contrast, recent Supreme Court decisions have stressed the importance of international comity. *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1 (1972), and *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506 (1974), upheld choice-of-forum and arbitration clauses against the contention of American plaintiffs that to pursue their disputes with foreign parties abroad would defeat American policies. Thus, the Court has let the principle of party autonomy prevail over asserted national interests. This principle, as all of the conflict of laws, is but a manifestation of a more fundamental idea reflected in the Court's rejection of the

> parochial concept that all disputes must be resolved under our laws and in our courts . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms.

417 U.S. at 519; 407 U.S. at 9.

These cases reaffirm the Court's continued adherence to the tenets of international good will and orderliness.[1] Similarly, the Court increasingly emphasizes the importance of federal/state comity. However, it has refrained, in recent times, from correcting encroachments by state courts upon interstate comity.

The Court's inaction is surprising considering that interstate and international orderlines are, at the very least, of equal importance. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 10 (1971). Indeed, state courts should have less power to disregard sister-state than foreign law. *Id.* comment *d* at 39; see J. MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 570 (OHIO U. PRESS 1966).

(2) It is true that a number of Supreme Court opinions suggest that sister-state law is entitled to full faith and credit pursuant to Article IV, § 1 of the Constitution and 28 U.S.C. § 1738 (1970).[2] However, commentators have seized upon language in some of these very decisions to conclude that choice-of-law rules have become obsolete and forum law should reign preeminent. Primarily, they rely upon *Alaska Packers Ass'n* v. *Industrial Accident* Comm'n, 294 U.S. 532 (1935), and *Pacific Employers Ins. Co.* v. *Industrial Accident* Comm'n, 306 U.S. 493 (1939). See B. CURRIE, SELECTED

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[1] For this tradition, which dates back to Mr. Justice Story's famous treatise, *see, e.g.*, Lauritzen v. Larsen, 345 U.S. 571 (1953); Hilton v. Guyot, 159 U.S. 113 (1895). The Court's continued emphasis on international comity accords with the national policy implicit in this country's joining the Hague Conference on Private International Law.

[2] *See, e.g.*, First Nat'l Bank v. United Airlines, 342 U.S. 396 (1952); Hughes v. Fetter, 341 U.S. 509 (1951); Carrol v. Lanza, 349 U.S. 408, 414, 422 (1955) (Mr. Justice Frankfurter dissenting).

ESSAYS ON THE CONFLICT OF LAWS, 117, 201-13, 271, 475-78, 602, 613-14 n.87, 631 (1963) (hereinafter cited as CURRIE); Horowitz, *The Law of Choice of Law in California*, 21 U.C.L.A. REV. 719, 728-29 (1974). Paradoxically, these cases did not pose any choice-of-law problems. They dealt with the extraterritorial reach of workers' compensation acts. Unlike courts in torts or contracts litigation, the state agencies administering such acts never apply sister-state law, so that conflicts issues do not arise. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS, Introductory Note to §§ 181-85 at 536 (1971). By sanctioning the state practice of giving these protective enactments broad extraterritorial coverage the Court could prevent the dismissal of meritorious claims arising out of interstate accidents. This solution is all the more reasonable considering the common policy and the substantial similarities between the various workers' compensation acts.

However, without regard to these pecularities, academicians, borrowing verbiage found in the workers' compensation cases, developed novel choice-of-law doctrines. California is not the only state to discard conflicts rules and to embrace a conflicts "approach." A glance at the entries in Shepard's Citator following the listing of *Babcock* v. *Jackson*, 12 N.Y. 2d 473, 240 N.Y.S. 2d 743, 191 N.E. 2d 279 (1963), the first opinion of a highest state court to abandon rules, indicates the new trend has swept the nation.

(3) Many judges and commentators, however, deplore this development. The present Chief Justice of the New York Court of Appeals, disavowing interest analysis, decried the "shifting ideologies in the choice of

law"[3] as well the "preverse parochialism" of applying local law to foreign transactions involving forum residents.[4] To quote a federal judge,

> gallons of ink spill across the law review pages as the conflicts revolution engages a counter-revolution in a rhubarb as esoteric and perplexing as anything American law has ever known.[5]

Another observer warns against letting choice of law become

> an over-sophisticated game . . . that adds complex multistate litigations to the crushing caseload of busy courts.[6]

Criticism has also been voiced in the Ninth Circuit:

> The law on "choice of law" in the various states and in the federal courts is a veritable jungle, which, if the law can be found out, leads not to a "rule of action" but a reign of chaos . . .
>
> *In re Paris Air Crash of March 3, 1974*, 399 F. Supp. 732, 739 (C.D. Cal. 1975).

The Court of Appeals seems equally disenchanted. A recent opinion comments:

> This appeal presents a classic example of the wilderness in which courts sometimes find themselves when searching for solutions to problems arising under the judicial nightmare known as Conflict of Laws.

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[3] Neumeier v. Kuehner, 31 N.Y. 2d 121, 130, 335 N.Y. 2d 64, 71, 286 N.E. 2d 454, 459 (1972) (Breitel, J., concurring).

[4] Miller v. Miller, 22 N.Y. 2d 12, 23, 29, 290 N.Y. 2d 734, 743, 748, 237 N.E. 2d 877, 883, 887 (1968) (Breitel J., dissenting).

[5] Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 WAYNE L. REV. 317, 334 (1967).

[6] Rosenberg, *Comments on* Reich v. Purcell, 15 U.C.L.A. REV. 551, 641, 647 (1968).

Forsyth v. *Cessna Aircraft Co.*, 520 F. 2d 608, 609 (9th Cir. 1975).

(4) These pronouncements suggest the discontent with the modern approaches to choice of law is directed mainly to the sophisticated ratiocinations they demand. However, if one reads the judicial opinions using such approaches for what they hold rather than for what they say, more important defects become apparent. The new orthodoxy, it seems, simply serves the purpose of furnishing verbal justifications for disregarding foreign law.[7] Also, the large majority of cases involve torts litigation and the plaintiff almost invariably wins. These observations certainly apply to California as shown by the instant case and its predecessors, *Reich* v. *Purcell*, 67 Cal. 2d 551, 63 Cal. Rptr. 31, 432 P. 2d 727 (1967), and *Hurtado* v. *Superior Court*, 11 Cal. 3d 574, 114 Cal. Rptr. 106, 522 P. 2d 666 (1974).

Thus, the pronouncements of the California Supreme Court demonstrates the homing trend inherent in interest analysis. This approach, premised on a philosophy of state egotism (see, *e.g.*, CURRIE at 53, 89, 112, 190, 592-93), imports a parochialism unparalled in American conflicts law. The process of balkanization equally affects the federal courts. In diversity cases they function as champions who must vindicate local law and the

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7 Too often the search for governmental interests in a particular case, especially for the purpose of sustaining application of forum law, is artificial . . . Since some reasons, usually a variety of them, can be called up in support of almost any rule of law that is on the books, it is nearly always possible for a good lawyer to conjure up governmental interest in just about any state that has any connection with a set of facts. It is not at all unusual for one state to discover that it has such interests in a set of facts though another's courts would say otherwise. A court is usually more discriminatingly hard-boiled in analyzing another state's interests than in analyzing its own.

R. LEFLAR, AMERICAN CONFLICTS LAW 252 (1968).

rights of local residents at the expense of sister-state law and non-residents. As a result, some of the courts in a federal system give less comity to sister-state law than they would have to accord, pursuant to this Court's decisions, to Cuban confiscations or contractual clauses choosing a foreign law or tribunal.

Two examples may serve to illustrate the coincidence of parochialism and ethnocentricity, a combination that compounds disdain of comity with disregard for equal protection. In *Hurtado* v. *Superior Court*, after quoting CURRIE at 183 to the effect that

> [n]ormally, even in cases involving foreign elements, the court should be expected, as a matter of course, to apply the rule of decision found in the law of the forum,

the California Supreme Court said:

> California does not have this interest [to compensate decedent's beneficiaries] in applying its wrongful death statute here because plaintiffs are residents of Mexico.

11 Cal. 3d 574, 582, 114 Cal. Rptr. 106, 522 P. 2d 666, 672 (1974).

A federal judge faithfully echoed this view, saying that

> the California courts would protect resident defendants and would not allow enhanced recovery to plaintiffs because of the fortuitous place of the crash or residence of the litigants.

In re Paris Air Crash of March 3, 1974
399 F. Supp. 732, 744 (C.D. Cal. 1975).[8]

In California, it seems, the outcome of interstate and international tort cases depends on who sues whom.

(5) The predictable result of this trend has been to encourage largescale forum shopping. Plaintiffs in interstate tort cases benefit from two conflicts privileges: the ever-expanding reach of long-arm jurisdiction (of which California furnishes a cogent example[9]) combined with the conflicts revolution permit counsel to select the most advantageous law together with the most advantageous forum. The faith and credit due to sister-state judgments effectively protects the forum shoppers' gains.[10]

Intrastate maneuvering was among the reasons prompting the Court to overturn almost 100 years of precedent in *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938). Interstate forum shopping seems hardly more desirable considering that "uniformities other than just those within the state are to be observed in a federal system."

[8] The judge also quoted the following passage from a Fifth Circuit opinion:

> We are a Court of the United States, an instrumentality created to effectuate the laws and policies of the United States. We conclude that in this case we have no warrant, legal or moral, to frustrate well established American policies by an application of the local policies of a foreign government.

Id. at 745. The decision containing this passage, Challoner v. Day and Zimmerman, Inc., 512 F. 2d 77, 82 (5th Cir. 1975), has since been vacated by this Court, 96 S. Ct. 167 (1975). The vacatur should please at least those who realize that American judicial opinions are also read abroad.

[9] See CAL. CODE OF CIV. PROC. § 410.10.

[10] The obvious connection between the recognition of sister-state judgments and sister-state law is demonstrated by recent developments in the European Community, a quasi-federal system. After adopting a convention that, in effect, provides for full faith and credit to member state judgments, the unification of national choice-of-law rules was considered necessary to prevent forum shopping. *See* Report, ch. I § 2, 9 REVISTA DI DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE 189, 201 (1973).

Wells v. *Simonds Abrasive Co.*, 345 U.S. 514, 519, 521 (1953) (Mr. Justice Jackson dissenting).

(6) Two remedies could inject orderliness and predictability into the adjudication of interstate transactions: (1) federal choice-of-law rules or (2) the federalization of larger areas of substantive law. Mr. Justice Jackson seriously considered the first of these alternatives[11] and it has been espoused since by a respectable array of scholars.[12] However, Congress has not seen fit to exercise the power to enact choice-of-law rules pursuant to Article IV, § 1, and the Court in *Day and Zimmermann, Inc.* v. *Challoner*, 96 S. Ct. 167 (1975), unanimously adhered to *Klaxon* v. *Stentor Electric Manufacturing Co., Inc.*, 313 U.S. 487 (1941). The second alternative could hardly appeal to those who believe in federalism. However, in light of the hazards posed by current conflicts approaches to an effective administration of interstate justice, it is understandable that some judges favor the expansion of federal common law rules.[13] Thus, paradoxically, *Klaxon* undercuts the very thrust of *Erie*.

(7) Unless there is some middle ground, state law will remain vulnerable either to sister-state or to federal encroachments. The Full Faith and Credit Clause clearly

[11] In addition to the dissenting opinion in *Wells*, see THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 41-44 (1955); *Full Faith and Credit — The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 26-28 (1945).

[12] *See* H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 713-18 (2d ed. 1973) (with further references).

[13] *See, e.g.*, Kohr v. Allegheny Airlines, Inc., 504 F. 2d 400 (7th Cir. 1974), cert. denied sub nom. Forth Corp. v. Allegheny Airlines, Inc., 421 U.S. 978 (1975); In re Paris Air Crash of March 3, 1974, 399 F. Supp. 732 (C.D. Cal. 1975); Tooker v. Lopez 24 N.Y. 2d 569, 586, 592, 301 N.Y.S. 2d 519, 533, 538, 249 N.E. 2d 394, 404, 408 (1969) (Burke J., concurring); *see generally* Wright, *supra* note 5.

empowers this Court to require a modicum of comity.[14] Indeed, it is the only tribunal in the nation that could effectively restrain the indiscriminate recourse to forum law. The most minimal restraint would be to require the states, in the interests of private litigants and comity, articulate choice-of-law rules that promise some degree of predictability and uniformity. Thus, the Court could provide guidance without having to construct a conflicts code. Ultimately, it can be expected the rules devised by state courts or legislatures will converge.

The vice of the "conflicts revolution" is that common to all upheavals: the suspension of the rule of law. CURRIE, at 183, contended: "We would be better off without choice-of-law rules." One of his followers maintained that "conflict of laws is a field, not of laws, but of men."[15] The California Supreme Court has endorsed such a non-rule philosophy. It said that

> the true function of this methodology can probably be appreciated only casuistically in its application to an endless variety of choice-of-law problems.

[Appendix A-14]

(8) While the trend toward unprincipled decision-making seems to accord with the spirit of our times, Professor Cavers, one of the early conflicts revolution-

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14 The very purpose of the full faith and credit clause was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws of by the judicial proceedings of the others ,and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin.

Milwaukee County v. M. E. White Co., 296 U.S. 268, 276-77 (1935).

15 Kay, *Ehrenzweig's Proper Law and Proper Forum*, 18 OKLA. L. REV. 233 (1965).

aires, warned against "slipping into a chaos of essentially meaningless *ad hoc* decisions." THE CHOICE-OF-LAW PROCESS 121 (1965). He observed "the problem we face today is not how to exorcise choice-of-law rules and principles but how to develop them." *Id.* at 113.[16] A former Solicitor General said:

> Quite apart from the function of conflict of laws in the international scene, its function within the United States is to bring order out of this chaos, and to provide some rules of law which will make it possible for states to decide cases having some external elements on a rational and reasonably consistent basis.
>
> Within the United States, there can very rarely be any legitimate basis for one state to apply its "public policy" against the laws of another state.
>
> * * *
>
> If each court . . . applies only its own law, then diverse precedents will surely develop, and counsel for plaintiffs will be remiss in their duty if they do not . . . file their suit . . . in a state which will give them a favorable result.
>
> * * *

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16 According to the Reporter for the RESTATEMENT (SECOND) OF CONFLICT OF LAWS,

> . . . throughout the ages the development of rules has been one of the primary objectives of the common law judge. This has been so because of the advantages that rules bring. Perhaps the most obvious of these benefits are certainty and predictability, its important factors not only for those planning future transactions but also for those confronting either lawsuits or problems of how much to offer or accept by way of settlement. An equally important advantage of rules is the fact that they greatly facilitate the judicial task . . . Far more difficult is the task of a judge when an approach is involved. Here he is told simply to consider one or more enumerated factors in arriving at his conclusion and usually is given little, if any, guidance as to the relative weight he should give these factors. As a result, each decision will be essentially ad hoc and the judge will rarely be able to rely upon, or even to obtain much guidance from, earlier opinions.

Reese, *Choice of Law: Rules or Approach*, 57 CORNELL L. REV. 315, 316-17 (1972).

> Not only is this a denial of true justice, but a denial of the purpose of the conflict of laws, but also it is a denial of law itself.
>
> * * *
>
> We will not always be successful in achieving uniformity, but we will surely have more success if we constantly hold up uniformity of results as a major objective, and recognize that there can be no true justice without it.

Griswold, *id.* at 20, 22, 23.

Opinions of this Court also seem to recognize the need for norms. Both in *Klaxon* and in *Challoner* the Court directed diversity judges to apply state "conflict of laws *rules*" [emphasis added]. 313 U.S. at 496; 96 S. Ct. at 168. Indeed, one might question whether *Klaxon* would have been decided the same way against a backdrop of conflicts lawlessness and caprice.

(9) In part the present anarchy is an overreaction to the rigid and simplistic methodology of the first Conflicts Restatement. However, this Court need not require states to formulate wooden and insensitive choice-of-law rules. Even the broad formulations of the RESTATEMENT (SECOND) OF CONFLICT OF LAWS might pass constitutional muster. Nor need the Court's mandate preclude state courts from following the lead of New Hampshire in articulating alternative reference rules geared to the intrinsic merits of competing laws.[17]

This Petitioner simply contends that a total abolition of choice-of-law rules, such as displayed by the California Supreme Court in the instant case, violates full faith and credit. The decisions of the California Supreme Court are consistent only in their refusal to

[17] *See* Clark v. Clark, 107 N.H. 351, 222 A. 2d 205 (1966).

apply sister-state rules that differ from California law. The modicum of comity essential to a federal system, however, calls for ascertainable standards to assure that choice-of-law decisions comport with full faith and credit. An *ad hoc* evaluation of competing interests, real or imaginary, that invariably leads to the preordained result of applying forum law cannot withstand constitutional scrutiny. The very purpose of law is to provide for order and equality. California's non-rule approach cannot satisfy even the barest minimum of deference to which sister-state law should be entitled.

II. THE CALIFORNIA SUPREME COURT VIOLATED THE FULL FAITH AND CREDIT CLAUSE BY APPLYING CALIFORNIA TORT RULES IN DISREGARD OF NEVADA LAW TO REGULATE CONDUCT, WITHIN NEVADA, OF A NEVADA ESTABLISHMENT.

(1) To justify subjecting Harrah's Club to a judgment premised on the California dram shop rule, the California Supreme Court reasoned that California could not reasonably effectuate its policy if it would not extend its regulation to include at least certain out-of-state tavern keepers and that "California's interest would be very significantly impaired if its policy were not applied to defendant." [Appendix A-17]

It is doubtful whether this assertion meets even the most expansive standards devised to justify the extraterritorial application of forum law. In *Bigelow* v. *Virginia*, 421 U.S. 809, 824 (1975), the Court said:

> A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citi-

> zens may be affected when they travel to that State.

Whether or not this rule is limited to First Amendment rights and interstate travelers, the formulation suggests that the attempt of state courts to regulate activities of foreign enterprises in disregard of sister-state laws are suspect.

Courts usually justify the extraterritorial reach of local law by invoking principles of legislative jurisdiction. Pertinent to the instant case would be the objective territorial principle first articulated by Mr. Justice Holmes in *Strassheim* v. *Daily*, 221 U.S. 280 (1911), and applied by Learned Hand, J., in *United States* v. *Aluminum Company of America*, 148 F. 2d 416 (2d Cir. 1945). Both judges, however, insisted the foreign conduct to which forum law was applied be *intended* to produce local effects in the forum state. Even this restrictive version of the principle is highly controversial. Its application has provoked foreign remonstrations[18] and the soundness of objective territoriality has been questioned by commentators in this country as well.[19] Indeed, the California Supreme Court specifically conceded that CALIFORNIA BUSINESS AND PROFESSIONS CODE § 25602 on which it had relied in *Vesely* v. *Sager*, 5 Cal. 3d 153, 95 Cal. Rptr. 623, 486 P. 2d 151 (1971), to impose civil liability could not be applied extraterritorially to the facts at bar. [Appendix A-19]

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[18] *See* W. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS 50-51 n.28 (2d ed. 1973).

[19] *See* COMMON MARKET AND AMERICAN ANTITRUST 357-59, 361-63, 382-92, 414-16 (J. Rahl ed. 1970).

(2) RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 18 (1965),[20] which purports to codify the *Strassheim/Alcoa* rule, hedges it with several qualifications to prevent overbroad extraterritorial assertions. California's judically created dram shop act fails to meet the test of § 18(a), since only a minority of jurisdictions holds tavern keepers liable for acts of their patrons.[21] Nor are the requirements of § 18(b) met since the accident in California was not the direct result of Harrah's Club's conduct in Nevada but depended on the alleged intervening negligence of a California driver. According to § 18 comment *f* at 50, clause (b) "requires more than a mere casual relationship" to satisfy the criterion of directness.

(3) Finally, a state claiming extraterritoriality should heed the limitations imposed by RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 40,[22] a provision

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[20] **Jurisdiction to Prescribe with Respect to Effect within Territory**
A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if either

(a) the conduct and its effect are generally recognized as constituent elements of a crime or tort under the law of states that have reasonably developed legal systems, or

(b) (i) the conduct and its effect are constituent elements of activity to which the rule applies; (ii) the effect within the territory is substantial; (iii) it occurs as a direct and foreseeable result of the conduct outside the territory; and (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.

[21] The wisdom of such a rule is open to doubt. Unlike products liability, which ultimately imposes the duty to compensate upon those best able to bear it, dramshop acts reach into the shallower pockets of barkeeps, large or small, who have no further recourse against potent manufacturers.

[22] **Limitations on Exercise of Enforcement Jurisdiction**
Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as

(a) vital national interests of each of the states,

(b) the extent and the nature of the hardship that inconsistent

designed to inhibit exorbitant enforcement jurisdiction. Since the California Supreme Court attempted to regulate conduct in Nevada territory of a Nevada corporation, the factors listed in § 40(c) and (d) are present. Moreover, even though the court called the state interests "important and abiding," [Appendix A-18], they clearly do not rise to the dignity of a "vital interest," such as antitrust policy. Rather, as the instant litigation demonstrates, dramshop liability in California simply serves as a stop-gap measure designed to provide some liability coverage despite the state's failure to enact or police effective mandatory automobile insurance. In contrast, Nevada has enacted a comprehensive scheme of no-fault motor vehicle insurance. See Motor Vehicle Ins. Act. NEV. REV. STAT. ch. 698 (1973). The "increased economic exposure" the California court imposed on sister-state taverns for the benefit of Californians shifts the burden of California law reform upon Nevada. As a recent California decision indicates, the judically created dramshop liability not only raises numerous puzzling issues but is so onerous that it may force tavern owners out of business. It is obvious that the California Supreme Court's opinion is directly aimed at and interferes with Nevada's hotel and casino business, an industry fundamental to the very survival of the state.

Recent newspaper accounts declare that liability insurance carriers are imposing vastly

enforcement actions would impose upon the person,

(c) the extent to which the required conduct is to take place in the territory of the other state,

(d) the nationality of the person, and

(e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

increased premium rates on California tavern owners as a consequence of the third-party claims emanating from *Vesley* v. *Sager*. The same accounts reveal fears that some tavern owners may be forced out of business; alternatively, that the price of drinks must be raised. Liability to injured customers as well as third persons would add to the reported economic burden . . . The past years have witnessed the expansion and extension of tort liability doctrines without corresponding attention to the reparations system. Commerce and industry have experienced increased liability insurance costs, which are ultimately borne by the consuming public. As the current medical malpractice predicament illustrates, insurance cost increases, justified or unjustified, ultimately result in politico-economic pressures which arouse legislative attention. The rate-fixing practices of the insurance industry, not ongoing social need, finally generate some legislative renovations. Judicial development of new or extended liability doctrines thus triggers forces far beyond judicial control. The courts must fit decisional law to changing times as best they may, leaving the executive and legislative branches to protect the business community and the public against unwarranted financial burdens.

Kindt v. *Kauffman*, 129 Cal. Rptr. 603, 615, 622-23 n.11, 57 Cal. App. 3d 845, 862, 874 n.11 (1976) (dissenting opinion).

Similarly, insurance premiums of all Nevada hotels, casinos and taverns, whether they be located in Wendover, Lake Tahoe or Reno, will increase drastically, since the California Supreme Court expressly declined to delineate the outer limits of the new rule it created. [Appendix A-16]

It therefore appears that Nevada's interests are considerably more impaired than California's.

California's laudable concern for the victims of automotive accidents should rely on domestic resources. The improvement of California's balance of payments hardly serves to justify mulcting a small neighboring state whose inhabitants are unable to protest this action through their own legislative processes, as they did when they repealed the criminal santcions against giving liquor to drunks.[23]

(4) Accordingly, the California Supreme Court, while conceding Nevada's interest, has disregarded even those restraints that are customarily observed among sovereign nations and should, with even greater cogency, be honored among sister states.

Beyond that, the pertinence of the objective territoriality principle to areas traditionally governed by choice-of-law rules seems doubtful. The principle was developed in the context of penal and regulatory enactments where, as in workers' compensation, there is no choice between competing laws. Indeed, this appears to be the first reported decision ever to grant recovery, under forum law, against a sister-state tavern. The RESTATEMENT (FIRST) OF CONFLICT OF LAWS (1934), which espouses the place-of-injury rule, in § 397 comment *a* modified this territorial principle, to avoid unfair surprise, by exempting foreign conduct attributable to defendants who had not "submitted" themselves to forum law. See also 2 J. BEALE, CONFLICT OF LAWS 1297 (1935). Even interest analysts seem to reach the same conclusion. See R. CRAMTON, D. CURRIE & H. KAY,

[23] Law of April 25, 1973, ch. 604, § 8, [1973] Nev. Laws 1062.

CONFLICT OF LAWS 294 (2d ed. 1975) (commenting on the intermediate appellate court decision in the instant case). One text specifically questions the constitutionality of holding foreign taverns liable under forum law. H. GOODRICH & E. SCOLES, CONFLICT OF LAWS 174 (4th ed. 1964).

The only Supreme Court decision dealing with a situation similar to the instant case is *Steele* v. *Bulova Watch Company, Inc.*, 344 U.S. 280 (1952), which applied the Lanham Act to acts committed in Mexico. However, the majority gave decisive weight to the fact that defendant was a United States citizen and resident. See *Vanity Fair Mills, Inc.* v. *T. Eaton Company*, 234 F. 2d 633 (2d Cir.), *cert. denied*, 352 U.S. 871 (1956).

(5) There can be little doubt that this Court has the power to proscribe the aggressive interference by one state with the police power of another. The Court has stated, on more than one occasion that it is the ultimate arbiter to resolve conflicting assertions of state interests. While the instant opinion of the California Supreme Court (as well as those in *Reich* and *Hurtado*) studiously avoids any reference to the Full Faith and Credit Clause, it borrowed the "comparative impairment" doctrine from an article devoted to the role of the Supreme Court in the field of conflicts law.[24] The author, decrying the homing trend, advocated the overruling of *Klaxon*. He conceived of comparative impairment as a notion of federal common law derived from the Full Faith and Credit Clause.[25] The very idea of allocating spheres of legal control assumes a neutral

[24] Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1 (1963).
[25] *Id.* at 41-42.

decisionmaker as opposed to a forum bent on protecting local interests.

Perhaps the California Supreme Court simply meant to predict how this Court would decide the case. If so, its interpretation of comparative impairment, and the resulting application of California law is entirely without Supreme Court or any other authority.

Accordingly, the instant case is an appropriate one for this Court to exercise its powers under the Full Faith and Credit Clause. Such a decision would fulfill an important responsibility owed to the states[26] and could serve as an antidote to the beggar-thy-neighbor practices currently in fashion. Conversely, to let full faith and credit lie dormant will encourage continued extraterritorial forays.[27] The time seems ripe to correct a major misdirection and to clarify once again that comity, rather than state egotism,[28] is the ultimate goal of conflicts law.

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[26] *See id.* at 24.

[27] When the approach that allows a state to apply its own law in marginal cases is augmented by expanded bases of personal jurisdiction and the mechanism of the class action, the combination raises the specter of massive invasions of one state into the policies of another, rigidly enforced by the rules of full faith and credit to judgments . . . Progress lies with more limitation, not less, and with a requirement that in applying its own law the state give proper regard to the interests of other states.

Martin, *Constitutional Limitations on Choice of Law*, 61 CORNELL L. REV. 185, 230 (1976).

[28] It would seem to be quite unsound to seek the roots of Conflicts law in the little vanities and susceptibilities of states or governments. . . . It would be a denial of essential justice to hold that a *bona fide* transaction consummated by the parties within a certain state and presumably with a view to the laws of that state should, by the intervention of a more or less adventitious foreign forum, suddenly be controlled by a legal system which the parties could not have expected to become the governing law of the transaction.

Bodenheimer, *The Public Policy Exception in Private International Law: A Reappraisal in the Light of Legal Philosophy*, 12 THE JURIST 51, 63 (1954).

CONCLUSION

In applying California law to a Nevada establishment incorporated and doing business in Nevada for conduct that took place exclusively in Nevada the California Supreme Court overstepped the boundaries of interstate comity, federalism and full faith and credit. For this reason a writ of certiorari should issue to review the judgment and opinion of the California Supreme Court.

Respectfully submitted,

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APPENDIX A

16 C. 3d 313; 128 Cal Rptr. 215, 546 P. 2d 719

APPENDIX A

OPINION AND JUDGMENT OF THE SUPREME COURT OF THE STATE OF CALIFORNIA

[S.F. No. 23242. In Bank. Mar 2, 1976.]

RICHARD A. BERNHARD,
Plaintiff and Appellant, V.

HARRAH'S CLUB
Defendant and Respondent.

SUMMARY

The trial court entered a judgment of dismissal following an order sustaining a demurrer without leave to amend to a personal injury complaint against a Nevada tavern keeper by a California resident who was struck on a highway in this state by an automobile driven by another California resident who had allegedly been furnished alcoholic beverages in defendant's drinking and gambling establishment after becoming obviously intoxicated. (Superior Court of Sacramento County, No. 224584, Joseph G. Babich, Judge.)

The Supreme Court reversed and remanded the cause to the trial court with directions to overrule the demurrer and to allow defendant a reasonable time within which to answer. The court held that the trial court erred in failing to apply California law under which civil liability may be imposed on tavern keepers who furnish liquor to intoxicated persons rather than the Nevada rule of nonliability. Stating that both states had a legitimate but conflicting interest in applying its

own law in respect to the civil liability of tavern keepers, the court employed the "comparative impairment" of governmental interest approach. Though it did not determine the outer limits to which the state policy of affording protection to persons injured by intoxicated persons who have been sold or furnished alcoholic beverages while intoxicated should be extended, the court held that the policy clearly encompassed one who, as alleged in the complaint, advertised for or otherwise solicited the business of California residents at its Nevada drinking and gambling establishments, knowing and expecting such persons, in response thereto, to use California public highways in going and coming from such establishments. The court held that the interest of California of preventing tavern keepers from selling alcoholic beverages to obviously intoxicated persons who are likely to act in California in the intoxicated state would be very significantly impaired if that policy were not applied under the circumstances alleged, whereas the interest of Nevada in protecting its tavern keepers from unrestricted civil liability would not be significantly impaired by imposing liability only on those tavern keepers who actively solicit California business. (Opinion by Sullivan, J., expressing the unanimous view of the court.)

HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1) *Conflict of Laws § 13 – Torts – Interest of States Involved* – When faced with the problem of choosing between the laws of two states as to which governs a tort action, a court must make an analysis of the respective interests of the states involved, the objective of which is to determine the law that most appropriately applies to the issue involved.

(2) *Conflict of Laws § 1–Application of Law or Foreign State.* – Generally, the court of the forum will apply its own rule of decision unless a party litigant timely invokes the law of the foreign state. In such event he must demonstrate that the foreign rule of decision will further the interest of the foreign state and therefore that it is an appropriate one for the forum to apply in the case before it.

(3) *Alcoholic Beverages § 24 – Offenses – Sale to Intoxicated Person – As Creating Civil Liability – Sale in Sister State.* – In an action by a California resident who alleged that he was injured in this state by an intoxicated California motorist who had been served alcoholic beverages in Nevada by defendant, a resident tavern keeper in that state, the trial court, in ruling on defendant's demurrer, erred in failing to apply California law under which civil liability may be imposed on tavern keepers who furnish liquor to intoxicated persons rather than

the Nevada rule of nonliability, where plaintiff alleged that defendant advertised for and solicited the business of California residents, expecting such persons, in response thereto, to use California highways in going and coming from its establishments. The legitimate interest of California of preventing tavern keepers from selling alcoholic beverages to obviously intoxicated persons who are likely to act in California while intoxicated would be very significantly impaired if that policy were not applied under the circumstances alleged, whereas the interest of Nevada in protecting its tavern keepers from unrestricted civil liability will not be significantly impaired by imposing liability only on those tavern keepers who actvely solicit California business.

[See *Cal. Jur. 3d*, Alcoholic Beverages, § 53; *Am. Jur. 2d*, Intoxicated Liquors, § 553 et seq.]

COUNSEL

Frederick W. Stephenson for Plaintiff and Appellant.

Hardy, Erich & Brown and Leo H. Schuering, Jr. for Defendant and Respondent.

OPINION

SULLIVAN J. – Plaintiff appeals from a judgment of dismissal entered upon an order sustaining without leave to amend the general demurrer of defendant Harrah's Club to plaintiff's first amended complaint.

Plaintiff's complaint, containing only one court, alleged in substance the following: Defendant Harrah's Club, a Nevada corporation, owned and operated gambling establishments in the State of Nevada in which intoxicating liquors were sold, furnished to the public and given away for consumption on the premises. Defendant advertised for and solicited in California the business of California residents at such establishments knowing and expecting that many California residents would use the public highways in going to and from defendant's drinking and gambling establishments.

On July 24,1971, Fern and Philip Myers, in response to defendant's advertisements and solicitations, drove from their California residence to defendant's gambling and drinking club in Nevada, where they stayed until the early morning hours of July 25, 1971. During their stay, the Myers were served numerous alcoholic beverages by defendant's employees, progressively reaching a point of obvious intoxication rendering them incapable of safely driving a car. Nonetheless defendant continued to serve and furnish the Myers alcoholic beverages.

While still in this intoxicated state, the Myers drove their car back to California. Proceeding in a northeasterly direction on Highway 49, near Nevada City, California, the Myers' car, driven negligently by a still intoxicated Fern Myers, drifted across the center line into the lane of oncoming traffic and collided head-on with plaintiff Richard A. Bernhard, a resident of California, who was then driving his motorcycle along said

highway. As a result of the collision plaintiff suffered severe injuries. Defendant's sale and furnishing of alcoholic beverages to the Myers, who were intoxicated to the point of being unable to drive safely, was negligent and was the proximate cause of the plaintiff's injuries in the ensuing automobile accident in California for which plaintiff prayed $100,000 in damages.

Defendant filed a general demurrer to the first amended complaint. In essence it was grounded on the following contentions: that Nevada law denies recovery against a tavern keeper by a third person for injuries proximate caused by the former by selling or furnishing alcoholic beverages to an intoxicated patron who inflicts the injuries on the latter; that Nevada law governed since the alleged tort was committed by defendant in Nevada; and that section 25602 of the California Business and Professions Code which established the duty necessary for liability under our decision in *Vesely* v. *Sager* (1971) 5 Cal. 3d 153 [95 Cal. Rptr. 623, 486 P. 2d 151], was inapplicable to a Nevada tavern. The trial court sustained the demurrer without leave to amend and entered a judgment of dismissal. This appeal followed.

(1) We face a problem in the choice of law governing a tort action. As we have made clear on other occasions, we no longer adhere to the rule that the law of the place of the wrong is applicable in a California forum regardless of the issues before the court. (*Hurtado* v. *Superior Court* (1974) 11 Cal. 3d 574, 579 [114 Cal. Rptr. 106, 522 P. 2d 666]; *Reich* v. *Purcell* (1967) 67 Cal. 2d 551, 555 [63 Cal. Rptr. 31, 432 P. 2d 727].) Rather we have adopted in its place a rule requiring an analysis of the respective interests of the states involved – the objective of which is " 'to determine the law that most appropriately applies to the issue involved.' " (*Hurtado*, *supra*, at pp. 579-580, quoting from *Reich*, *supra*, at p. 555.)

The issue involved in the case at bench is the civil liability of defendant tavern keeper to plaintiff, a third person, for injuries allegedly caused by the former by selling and furnishing alcoholic beverages in Nevada to intoxicated patrons who subsequently injured plaintiff in California. Two states are involved: (1) California – the place of plaintiff's residence and domicile, the place where he was injured, and the forum; and (2) Nevada – the place of defendant's residence and the place of the wrong.

We observe at the start that the laws of the two states – California and Nevada – applicable to the issue involved are not identical. California imposes liability on tavern keepers in this state for conduct such as here alleged. In *Vesely* v. *Sager*, *supra*, 5 Cal. 3d 153, 166, this court rejected the contention that "civil liability for tavern keepers should be left to future legislative action . . . First liability has been denied in cases such as the one before us solely because of the judicially created rule that the furnishing of alcoholic beverages is not the proximate cause of injuries resulting from intoxication. As demonstrated, *supra*, this rule is patently unsound and totally inconsistent with the principles of

proximate cause established in other areas of negligence law . . . Second, the Legislature has expressed its intention in this area with the adoption of Evidence Code section 669, and Business and Professions Code section 25602 . . . It is clear that Business and Professions Code section 25602 [making it a misdemeanor to sell to an obviously intoxicated person] is a statute to which this presumption [of negligence, Evidence Code section 669] applies and that the policy expressed in the statute is to promote the safety of the people of California . . . " Nevada on the other hand refuses to impose such liability. In *Hamm* v. *Carson City Nuggett, Inc.* (1969) 85 Nev. 99 [450 P. 2d 358, 359], the court held it would create neither common law liability nor liability based on the criminal statute banning sale of alcoholic beverages to a person who is drunk, because "if civil liability is to be imposed, it should be accomplished by legislative act after appropriate surveys, hearings, and investigations to ascertain the need for it and the expected consequences to follow." It is noteworthy that in *Hamm* the Nevada court in relying on the common law rule denying liability cited our decision in *Cole* v. *Rush* (1955) 45 Cal. 2d 345 [289 P. 2d 450, 54 A.L.R. 2d 1137], later overruled by us in *Vesely* to the extent that it was inconsistent with that decision. (See *Vesely* v. *Sager*, *supra*, 5 Cal. 3d at p. 167).

Although California and Nevada, the two "involved states" (*Reich* v. *Purcell*, *Supra*, 67 Cal. 2d 551, 553; see also *Hurtado* v. *Superior Court*, *supra*, 11 Cal. 3d 574, 579), have different laws governing the issue presented in the case at bench, we encounter a problem in selecting the applicable rule of law only if *both* states have an interest in having their respective laws applied. (2) "[G]enerally speaking the forum will apply its own rule of decision unless a party litigant timely invokes the law of a foreign state. In such event he must demonstrate that the latter rule of decision will further the interest of the foreign state and therefore that it is an appropriate one for the forum to apply to the case before it. [Citations.]" (*Hurtado*, *supra*, at p. 581.)

Defendant contends that Nevada has a definite interest in having its rule of decision applied in this case in order to protect its resident tavern keepers like defendant from being subjected to a civil liability which Nevada has not imposed either by legislative enactment or decisional law. It is urged that in *Hamm* v. *Carson City Nuggett*, *supra*, 450 P. 2d 358, 359, the Supreme Court of Nevada clearly delineated the policy underlying denial of civil liability of tavern keepers who sell to obviously intoxicated patrons: "Those opposed to extending liability point out that to hold otherwise would subject the tavern owner to ruinous exposure every time he poured a drink and would multiply litigation endlessly in a claim-conscious society. Every liquor vendor visited by the patron who became intoxicated would be a likely defendant in subsequent litigation flowing from the patron's wrongful conduct . . . Judicial restraint is a worthwhile practice when the proposed new doctrine may have implications far beyond the perception of the court asked to declare it.

They urge that if civil liability is to be imposed, it should be accomplished by legislative act after appropriate surveys, hearings, and investigations . . . We prefer this point of view." Accordingly defendant argues that the Nevada rule of decision is the appropriate one for the forum to apply.

Plaintiff on the other hand points out that California also has an interest in applying its own rule of decision to the case at bench. California imposes on tavern keepers civil liability to third parties injured by persons to whom the tavern keeper has sold alcoholic beverages when they are obviously intoxicated "for the purpose of protecting members of the general public from injuries to person and damage to property resutling from the excessive use of intoxicating liquor." (*Vesely* v. *Sager*, *supra*, 5 Cal. 3d 153, 165.) California, it is urged, has a special interest in affording this protection to all California residents injured in California.

(3) Thus since the case at bench involves a California resident (plaintiff) injured in this state by intoxicated drivers and a Nevada resident tavern keeper (defendant) which served alcoholic beverages to them in Nevada, it is clear that each state has an interest in the application of its respective law of liability and nonliability. It goes without saying that these interests conflict. Therefore, unlike *Reich* v. *Purcell*, *supra*, 67 Cal. 2d 551, and *Hurtado* v. *Superior Court*, *supra*, 11 Cal. 3d 574, where we were faced with "false conflicts," in the instant case for the first time since applying a governmental interest analysis as a choice of law doctrine in *Reich*, we are confronted with a "true" conflicts case. We must therefore determine the appropriate rule of decision in a controversy where each of the states involved has a legitimate but conflicting interest in applying its own law in respect to the civil liability of tavern keepers.

The search for the proper resolution of a true conflicts case, while proceeding within orthodox parameters of governmental interest analysis, has generated much scholary examination and discussion.[1] The father of the governmental interest approach,[2] Professor Brainerd

[1] Baxter, *Choice of Law and the Federal System* (1963) 16 Stan. L. Rev. 1; Cavers. The Choice of Law Process (1965) 114-224; Horowitz, *The Law of Choice of Law in California-A Restatement* (1974) 21 UCLA L.Rev. 719, 748-758; *Conflict of Laws Round Table: A Symposium* (1972) 57 Iowa L.Rev. 1219-1270; *Symposium, Conflict of Laws Round Table* (1971) 49 Texas L.Rev. 211-245; Sedler, *Reviews-Conflicts Commentary* 50 Texas L.Rev. 1064-1083; Weintraub, Commentary on the Conflict of Laws (1971). We note that no case has been called to our attention, nor are we aware of one, which has discussed this problem in a context relevant to the case at bench.

[2] Traditionally the search for choice of law rules focused upon the interests of the immediate parties to the action in terms of their private rights. Thus, it concentrated "upon the same factors that would be dispositive in a similar case wholly internal to a single state. I cannot escape the conclusion that a search so oriented must prove unrewarding. Every choice-of-law case involves parties, each of whom would prevail if the internal law of one rather than another state were applied. Each party is 'right,' 'worthy,' and 'deserving' and 'ought in all fairness' to prevail under one of the competing bodies of law and in the view of one of the competing groups of lawmakers. Fact situations which differ only in that they are internal to a single state have been assessed by the different groups of lawmakers, and each has reached a different value judgment on the rule best calculated to serve the overall interests of its community. If attention is confined to the circumstances of the immediate parties, the conflict between the internal laws and between the value judgments they are intended to implement cannot be resolved by the judge unless he is prepared to impose still another value judgment upon the controversy . . . [¶] These difficulties can be avoided if normative criteria can be found which relate to the very aspects of a conflicts case that distinguish it from an analogous internal case. That such criteria can be elaborated in many, if not all, conflicts cases has been demonstrated by several writers who have urged that conflicts cases be resolved on the basis of the governmental interests involved. . . . [¶] [T]he process of resolving choice cases is necessarily one of allocating spheres of legal control among states. His [Professor Currie] thesis, like mine, is that the process of allocation should not be

Currie, originally took the position that in a true conflicts situation the law of the forum should always be applied. (Currie, Eelected Essays on Conflicts of Laws (1963) p. 184)) However, upon further reflection, Currie suggested that when under the governmental interest approach a preliminary analysis reveals an apparent conflict of interest upon the forum's assertion of its own rule of decision, the forum should reexamine its policy to determine if a more restrained interpretation of it is more appropriate. "[T]o assert a conflict between the interests of the forum and the foreign state is a serious matter; the mere fact that a suggested broad conception of a local interest will create conflict with that of a foreign state is a sound reason why the conception should be reexamined, with a view to a more moderate and restrained interpretation both of the policy and of the circumstances in which it must be applied to effectuate the forum's legitimate purpose. . . . An analysis of this kind . . . was brilliantly performed by Justice Traynor in *Bernkrant* v. *Fowler* (1961) 55 Cal. 2d 588 [12 Cal. Rptr. 266, 360 P. 2d 906]." (Currie, *The Disinterested Third State* (1963) 28 Law & Contempt. Prob., pp. 754, 757; see also Sedler in *Symposium, Conflict of Laws Round Table, supra,* 49 Texas L.Rev. 211 at 224-225.) This process of reexamination requires identification of a "real interest as opposed to a hypothetical interest" on the part of the

performed unconsciously, that the private interests in choice cases are necessarily in balance, and that the cases can be decided by viewing them as instances of conflicting states interests rather than of conflicting private interests." (Baxter, *Choice of Law and the Federal System, supra,* 16 Stan.L.Rev. 1, 5, 6, 22, fn. omitted.)

forum (Sedler, *Value of Principled Preferences,* 49 Texas L.Rev. 224) and can be approached under principles of "comparative impairment." (Baxter, *Choice of Law and the Federal System, supra,* 16 Stan. L.Rev. 1-22; Horowitz, *The Law of Choice of Law in California – A Restatement, supra,* 21 UCLA L.Rev. 719, 748-758.)

Once this preliminary analysis has identified a true conflict of the governmental interests involved as applied to the parties under the particular circumstances of the case, the "comparative impairment" approach to the resolution of such conflict seeks to determine which state's interest would be more impaired if its policy were subordinated to the policy of the other state. This analysis proceeds on the principle that true conflicts should be resolved by applying the law of the state whose interest would be the more impaired if its law were not applied. Exponents of this process of analysis emphasize that it is very different from a weighing process. The court does not " 'weigh' the conflicting governmental interests in the sense of determining which conflicting law manifested the 'better' or the 'worthier' social policy on the specific issue. An attempted balancing of conflicting state policies in that sense . . . is difficult to justify in the context of a federal system in which, within constitutional limits, states are empowered to mold their policies as they wish . . . [The process] can accurately be described as . . . accommodation of conflicting state policies, as a problem of allocating domains of law-making power in multistate contexts – limitations on the reach of state policies

– as dinstinguished from evaluating the wisdom of those policies. . . . [E]mphasis is placed on the appropriate scope of conflicting state policies rather than on the 'quality' of those policies . . . " (Horowitz, *The Law of Choice of Law in California – A Restatement*, *supra*, 21 UCLA L.Rev. 719, 753; see also Baxter, *Choice of Law and the Federal System*, *supra*, 16 Stan.L.Rev. 1 18-19.) However, the true function of this methodology can probably be appreciated only casuistically in its application to an endless variety of choice of law problems. (See, e.g., the hypothetical situations set forth in *Baxter*, *op. cit.*, pp. 10-17.)

Although the concept and nomenclature of this methodology may have received fuller recognition at a later time, it is noteworthy that the core of its rationale was applied by Justice Traynor in his opinion for this court in *People* v. *One 1953 Ford Victoria* (1957) 48 Cal. 2d 595 [311 P. 2d 480]. There in a proceeding to forfeit an automobile for unlawful transportation of narcotics we dealt with the question whether a chattel mortgage of the vehicle given in Texas and, admittedly valid both in that state and this, succumbed to the forfeiture proceedings. The purchaser of the car, having executed a note and chattel mortgage for the unpaid purchase price, without the consent of the mortgagee drove the vehicle to California where he used it to transport marijuana. Applicable California statutes made it clear that they did not contemplate the forfeiture of the interest of an innocent mortgagee, that is a person whose "interest was created after a reasonable investigation of the moral responsibility, character and reputation of the purchaser and without any knowledge that the vehicle was being, or was to be, used for the purpose charged . . . " Texas had no similar statute; nor had the mortgagee, though proving that the mortgage was bona fide, also proved that he had made the above reasonable investigation of the mortgager.

It was clear that Texas had an interest in seeing that valid security interests created upon the lawful purchase of automobiles in Texas be enforceable and recognized. California had an interest in controlling the transportation of narcotics. Each interest was at stake in the case, since the chattel mortgage had been validly created in Texas and the car was used to transport narcotics in California. The crucial question confronting the court was whether the "reasonable investigation" required by statute of a California mortgagee applied to the Texas mortgagee. Employing what was in substance a "comparative impairment" approach, the court answered the question in the negative. "It is contended that a holding that the 'reasonable investigation' requirement is not applicable to respondent will subvert the enforcement of California's narcotics laws. We are not persuaded that such dire consequences will ensue. The state may still forfeit the interest of the wrongdoer. It has done so in this case. Moreover, the Legislature has made plain its purpose not to forfeit the interests of innocent mortgagees. It has not made plain that 'reasonable investigation' of the purchaser is such an essential element of innocence that it must be made

even by an out-of-state mortgagee although such mortgagee could not reasonably be expected to make such investigation." (*Id.*, at p. 599.)

Mindful of the above principles governing our choice of law, we proceed to reexamine the California policy underlying the imposition of civil liability upon tavern keepers. At its broadest limits this policy would afford protection to all persons injured in California by intoxicated persons who have been sold or furnished alcoholic beverages while intoxicated regardless of where such beverages were sold or furnished. Such a broad policy would naturally embrace situations where the intoxicated actor had been provided with liquor by out-of-state tavern keepers. Although the State of Nevada does not impose such *civil* liability on its tavern keepers, nevertheless they are subject to *criminal* penalties under a statute making it unlawful to sell or give intoxicating liquor to any person who is drunk or known to be an habitual drunkard. (See Nev. Rev. Stats. 202.100; see *Hamm* v. *Carson City Nuggett, Inc.*, *supra*, 450 P. 2d 358.)

We need not, and accordingly do not here determine the outer limits to which California's policy should be extended, for it appears clear to us that it must encompass defendant, who as alleged in the complaint, "advertis[es] for and otherwise solicit[s] in California the business of California residents at defendant HARRAH'S CLUB Nevada drinking and gambling establishments, knowing and expecting said California residents, in response to said advertising and solicitation, to use

the public highways of the State of California in going and coming from defendant HARRAH'S CLUB Nevada drinking and gambling establishments." Defendant by the course of its chosen commercial practice has put itself at the heart of California's regulatory interest, namely to prevent tavern keepers from selling alcoholic beverages to obviously intoxicated persons who are likely to act in California in the intoxicated state. It seems clear that California cannot reasonably effectuate its policy if it does not extend its regulation to include out-of-state tavern keepers such as defendant who regularly and purposely sell intoxicating beverages to California residents in places and under conditions in which it is reasonably certain these residents will return to California and act therein while still in an intoxicated state. California's interest would be very significantly impaired of its policy were not applied to defendant.

Since the act of selling alcoholic beverages to obviously intoxicated persons is already proscribed in Nevada, the application of California's rule of civil liability would not impose an entirely new duty requring the ability to distinguish between California residents and other patrons. Rather the imposition of such liability involves an increased economic exposure, which, at least for businesses which actively solicit extensive California patronage, is a foreseeable and coverable business expense. Moreover, Nevada's interest in protecting its tavern keepers from civil liability of a boundless and unrestricted nature will not be significantly impaired when as in the instant case liability

is imposed only on those tavern keepers who actively solicit California business.[3]

Therefore, upon reexamining the policy underlying California's rule of decision and giving such policy a restrained interpretation for the purpose of this case pursuant to the principles of the law of choice of law discussed above, we conclude that California has an important and abiding interest in applying its rule of decision to the case at bench that the policy of this state would be more significantly impaired if such rule were not applied and that the trial court erred in not applying California law.

Defendant argues, however, that even if California law is applied, the demurrer was nonetheless properly sustained because the tavern keeper's duty stated in *Vesely* v. *Sager, supra,* 5 Cal. 3d 153, is based on Business and Professions Code section 25602, which is a criminal statute and thus without extraterritorial effect. It is quite true, as defendant argues, that in *Vesely* we determined "that civil liability results when a vendor

[3] Defendant asserts that Nevada's law must be applied because it is the law of the place of sale and cites three cases in support of that proposition. *Trapp* v. *4-10 Investment Corporation* (8th Ci. 1970) 424 F. 2d 1261; *Zuker* v. *Vogt* (D. Conn 1961) 200 F. Supp. 340; and *Schmidt* v. *Driscol Hotel* (1957) [82 N.W. 2d 365]. It is true that all three cases applied the law of the place of sale of the alcohol, but not for that reason. In *Trapp* and *Zuker* all the states involved had dram shop acts which would permit civil liability and the federal courts determined that the applicable forum state would give effect to the common policy of liability for sale to intoxicated persons regardless of traditional tort conflict rules. *Schmidt* is the only case where one state, Wisconsin, did not have a dram shop act and the other state, Minnesota, did. However, in that case even though the injury occurred in Wisconsin, the alcohol was sold and consumed in Minnesota and all the parties involved were from Minnesota. Moreover, none of these cases involved a case of true conflict between two state interests where the court endeavored to resolve the conflict by resort to the principles of governmental interest analysis. They are therefore inopposite.

furnishes alcoholic beverages to a customer in violation of Business and Professions Code section 25602 and each of the conditions set forth in Evidence Code section 669, subdivision (a), is established." (5 Cal. 3d at p. 157.)

It is also clear, as defendant's argument points out, that since, unlike the California vendor in *Vesely*, defendant was a Nevada resident which furnished the alcoholic beverage to the Myers in that state, the above California statute had no extraterritorial effect and that civil liability could not be posited on defendant's violation of a California criminal law. We recognize, therefore, that we cannot make the same determination as quoted above with respect to defendant that we made with respect to the defendant vendor in *Vesely*.

However, our decision in *Vesely* was much broader than defendant would have it. There, at the very outset of our opinion, we declared that the traditional common law rule denying recovery on the ground that the furnishing of alcoholic beverage is not the proximate cause of the injuries inflicted on a third person by an intoxicated individual "is patently unsound." (5 Cal. 3d at p. 157.) Observing that "[u]ntil fairly recently, it was uniformly held that [such] an action could not be maintained at common law" (*id.*, at p. 158) and reviewing in detail the common law rule (*id.*, at pp. 158-164) we concluded that "the furnishing of an alcoholic beverage to an intoxicated person may be a proximate cause of injuries inflicted by that individual upon a third per-

son." We reasoned: "If such furnishing is a proximate cause, it is so because the consumption, resulting intoxication, and injury-producing conduct are foreseeable intervening causes, or at least the injury-producing conduct is one of the hazards which makes such furnishing negligent." (*Id.*, at p. 164.)

Proceeding to the question of the tavern keeper's duty in this respect and rejecting his contention that civil liability for tavern keepers should be left to future legislative action, we noted that "liability has been denied in cases such as the one before us solely because of the judicially created rule that the furnishing of alcoholic beverages is not the proximate cause of injuries resulting from intoxication. As demonstrated, *supra*, this rule is patently unsound and totally inconsistent with the principles of proximate cause established in other areas of negligence law. Other common law tort rules which were determined to be lacking in validity have been abrogated by this court (see *Gibson* v. *Gibson* (1971) 3 Cal. 3d 914 [92 Cal. Rptr. 288, 479 P. 2d 648]; *Muskopf* v. *Corning Hospital Dist.* (1961) 55 Cal. 2d 211 [11 Cal. Rptr. 89, 359 P. 2d 457]), and there is no sound reason for retaining the common law rule presented in this case." (5 Cal. 3d at p. 166.)

In sum, our opinion in *Vesely* struck down the old common law rule of nonliability constructed on the basis that the consumption, not the sale, of alcoholic beverages was the proximate cause of the injuries inflicted by the intoxicated person. Although we chose to impose liability on the *Vesely* defendant on the basis of

his violating the applicable statute, the clear import of our decision was that there was no bar to civil liability under modern negligence law. Certainly, we said nothing in *Vesely* indicative of an intention to retain the former rule that an action at common law does not lie. The fact then, that in the case at bench, section 25602 of the Business and Professions Code is not applicable to this defendant in Nevada so as to warrant the imposition of civil liability on the basis of its violation, does not preclude recovery on the basis of negligence apart from the statute. Pertinent here is our observation in *Rowland* v. *Christian* (1968) 69 Cal. 2d 108, 118-119 [70 Cal. Rptr. 97, 443 P. 2d 561, 32 A.L.R. 3d 496]: "It bears repetition that the basic policy of this state set forth by the Legislature in section 1714 of the Civil Code is that everyone is responsible for an injury caused to another by his want of ordinary care or skill in the management of his property."

The judgment is reversed and the cause is remanded to the trial court with direction to overrule the demurrer and to allow defendant a reasonable time within which to answer.

Wright, C. J., McComb, J., Tobriner, J., Mosk J, Clark, J., and Molinari, J.,* concurred.

*Assigned by the Chairman of the Judicial Council.

APPENDIX B

APPENDIX B

ORDER OF THE SUPREME COURT OF THE STATE OF CALIFORNIA DENYING REHEARING

CLERK'S OFFICE, SUPREME COURT

4250 State Building

SAN FRANCISCO, CALIFORNIA 94102

Apr. 22, 1976

I have this day filed Order

REHEARING DENIED

In re: S.F. *No.* 23242

Bernhard

vs.

Harrah's Club

Respectfully,

G. E. BISHEL
Clerk

APPENDIX C

APPENDIX C

Richard Alton BERNHARD, Plaintiff and Appellant,

v.

Fern Virginia MYERS, et al., Defendants,
Harrah's Club, a Nevada Corporation,
Defendant and Respondent.
Civ. 14030.

Court of Appeal, Third District.
Nov. 8, 1974.
Hearing Granted Jan. 8, 1975.

Action by injured California motorcyclist against Nevada drinking establishment which allowed California motorist to become intoxicated prior to accident with motorcyclist in California. The Superior Court, Sacramento County, Joseph G. Babich, J., sustained a general demurrer without leave to amend, and motorcyclist appealed. The Court of Appeal, Paras, J., held that California law allowing for civil liability to third party injured by one allowed to become intoxicated in violation of a criminal dram shop act, rather than law of Nevada which did not allow for civil liability, would be applied where both the individual and governmental interests of Nevada and California were equal; and that drinking establishment owed a common-law duty to California motorcyclist using California highways not to cause him injury by selling alcohol to an intoxicated person.

Reversed.

1. Action Key 17

Intoxicating Liquors Key 282

California law allowing for civil liability to third party injured by one allowed to become intoxicated in violation of a criminal dram shop act, rather than law of Nevada which did not allow for civil liability, would be applied to action by motorcyclist, who was injured in California accident by California resident motorist who was allowed to become intoxicated in Nevada, defendant's gambling and drinking establishment, since both the individual and governmental interests of Nevada and California were equal. West's Ann. Bus. & Prof. Code, § 25602; N.R.S. 202.100, subd. 1.

2. Intoxicating Liquors Key 288

Nevada liquor establishment owed a common-law duty to California motorcyclist, who was injured in California when struck by California motorist who was allowed to become intoxicated in such liquor establishment, not to cause him injury by selling alcohol to intoxicated person or known habitual drunkard. West's Ann. Bus. & Pro. Code, §§ 23001, 25602; West's Ann. Evid. Code, § 669.

Frederick W. Stephenson, Sacramento, for plaintiff and appellant.

Hardy, Erich & Brown, Sacramento, for defendant and respondent.

PARAS Associate Justice.

This is an appeal from a judgment of dismissal entered by the court below following an order sustaining a general demurrer without leave to amend.[1]

FACTS[2]

On July 24, 1971, in response to the advertisements and solicitations of defendant, Fern and Philip Myers[3] drove their automobile from the State of California, where they resided, to a gambling and drinking establishment owned by defendant in the State of Nevada. The Myers remained at defendant's club until the early morning hours of July 25, 1971. During the course of their stay the Myers were served numerous alcoholic beverages by employees of defendant. By virtue of the consumption of the alcoholic beverages served, the Myers reached a point of obvious intoxication, rendering them incapable of safely driving a motor vehicle. Despite this fact, defendant continued to sell, furnish and give additional alcoholic beverages to the Myers.

While in this intoxicated state, the Myers left defendant's club and drove to Nevada County, California. While driving on Highway 49, the Myers car drifted across the center line into the lane of oncoming traffic and collided head-on with plaintiff who was riding a motorcycle. As a result of the accident, plaintiff suffered sereve injuries.

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1 The defendant Harrah's Club, a Nevada Corporation, was the only defendant named in the complaint to appear below. It filed a demurrer alleging that the complaint failed to state facts sufficient to constitute a cause of action against Harrah's.

2 The facts are taken from the allegations of the first amended complaint.

3 The Myers were named as defendants but are not parties to this appeal. Hereinafter the word "defendant" shall be used to designate the defendant and respondent Harrah's Club.

CHOICE OF LAW

[1] In Vesely v. Sager (1971), 5 Cal. 3d 153, 95 Cal. Rptr. 623, 486 P. 2d 151, the California Supreme Court considered the question of whether civil liability may be imposed upon a vendor of alcoholic beverages for providing alcoholic drinks to a customer who, as a result of intoxication, injures a third person. The court determined that the common law rule denying liability is unsound; it held that civil liability results when (1) a vendor furnishes alcoholic beverages to a customer in violation of Business and Professions Code section 25602[4] and (2) a third person is proximately injured or damaged thereby.

In 1969, the Supreme Court of Nevada considered the same question. In Hamm v. Carson City Nugget, Inc. (1969), 85 Nev. 99, 450 P. 2d 358, the court refused to abrogate the common law rule and held that a somewhat similar Nevada statute[5] did not create civil liability of tavern keepers to injured third parties. The court stated that the matter was one for legislative action and not court pronouncement (450 P. 2d at pp. 359-360.) and that the Nevada Legislature has expressed itself clearly in favor of no civil liability.

Thus the primary question before us is one of the proper choice of law, given the conflicting rules of

[4] This section reads: "Every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any habitual or common drunkard or to any obviously intoxicated person is guilty of a misdemeanor."

[5] N.R.S. 202.100(1) reads in part: "It shall be unlawful for the proprietor, bartender or person in charge of any saloon or bar to sell or give, or to permit to be sold or given, any intoxicating liquor to any person who is drunk, or to any person known by such proprietor, bartender or person in charge to be an habitual drunkard or dipsomaniac . . . "

Nevada and California. Which law should apply? If Nevada law, no cause of action is stated; and if California law, the trial court erred.

Forty years ago the decision would have been a relatively simple one. "For many years courts applied the law of the place of the wrong in tort actions regardless of the issues before the court, e.g., whether they involved conduct, survival of actions, applicability of a wrongful death statute, immunity from liability, or other rules determining whether a legal injury has been sustained." (Reich v. Purcell (1967) 67 Cal. 2d 551, 553, 63 Cal. Rptr. 31, 33, 432 P. 2d 727, 729.) The original Conflicts Restatement of 1934 so provided in section 378. Section 379 more specifically detailed the applicability of the law of the place of the wrong in torts arising out of intentional conduct negligent conduct, and conduct giving rise to absolute liability; while section 377 defined the place of the wrong as "the state where the last event necessary to make an actor liable for an alleged tort takes place." Applying that rule, which until Reich v. Purcell, supra, p. 555, 63 Cal. Rptr. 31, 432 P. 2d 727, was the California rule as well (see Loranger v. Nadeau (1932) 215 Cal. 362 10 P. 2d 63), this case would be resolved in favor of plaintiff.[6] Although the defendant's actions giving rise to liability occurred in the State of Nevada, the accident occurred in California and this is the last event necessary to

[6] Restatement of Conflicts, (original) section 382, subdivision (2) might at first glance appear to make an exception whereas here the act is not tortious in Nevada where it takes palce but is in California where the place of the wrong is. But a more careful reading of section 382, subdivision (2) together with the comment thereto dispels any such doubt.

create the tort. Thus California is the place of the wrong and California law would apply.

But in the past forty years the law of conflicts has undergone much development. In Reich v. Purcell, supra, the California rule was redefined by Justice Traynor as follows: "In a complex situation involving multi-state contacts, however, no single state alone can be deemed to create exclusively governing rights. . . . The forum must search to find the proper law to apply based upon the interest of the litigants and the involved states. . . . Accordingly, when application of the law of the place of the wrong would defeat the interests of the litigants and of the states concerned, we have not applied that law. . . . As the forum we must consider all of the foreign and domestic elements and interests involved . . . to determine the rule applicable." (Reich v. Purcell, supra, 67 Cal. 2d pp. 553-555, 63 Cal. Rptr. p. 33, 432 P. 2d p. 729.) Justice Traynor's approach has been termed "the governmental interest approach", the objective of which is 'to determine the law that most appropriately applies to the issue involved.' " (Hurtado v. Superior Court (1974) 11 Cal. 3d 574, 579-580, 114 Cal. Rptr. 106, 109.)

In addition to California, numerous jurisdictions throughout the United States departed from the place of the wrong approach (see cases cited in Reich v. Purcell, supra, 67 Cal. 2d p. 555, 63 Cal. Rptr. 31, 432 P. 2d 727), and in 1969 the American Law Institute rejected the place of wrong rule and in its place adopted the principle of applying the law of the state which "has the most significant relationship to the occurrence and the parties. . . . " (Rest., Conflicts 2d, § 145 et seq.) A

number of legal scholars have contributed their views, not by any means with unanimity of thought. (See Comments on Reich v. Purcell, 15 U.C.L.A. Rev. 551; Symposium on Cipolla v. Shaposka, 9 Duquesne L. Rev. pp. 347-465; Kasel v. Remington Arms Co. (1972) 24 Cal. App. 3d 711, 729, 730, 101 Cal. Rptr. 314.)

Applying the governmental interest approach to this case and comparing it to other authorities in California, we find it totally unique. There are but two states involved, as well as two parties. The interests of the parties cancel each other out, plaintiff being interested in recovery, defendant being interested in no recovery. The State of California is the place of the residence of the plaintiff and the place where the automobile collision occurred. The State of Nevada is the state of residence of the defendant and the place where the act occurred which it is claimed gave rise to liability. California has an interest in compensating its resident plaintiff; Nevada has an interest in protecting its resident defendant from a money judgment in these circumstances and thus in not compensating the foreign plaintiff. Both states have an interest in regulating the conduct of tavern owners and operators to the end that the service of liquor to obviously intoxicated persons and habitual drunkards is to be discouraged; indeed both have enacted penal statutes to serve this interest. By judicial interpretation California has fortified this interest through civil liability; by judicial interpretation, Nevada has not so fortified the interest. Both states have an equal right to expend or limit their public policy in this area, and the decision of each is to be respected by the other.

Thus the interests, both individual and governmental are equal.

In Reich v. Purcell, supra, application of the governmental interest approach resulted in the obvious conclusion that the state of the place of the wrong (Missouri) had no interest in applying its law, where the plaintiff was a resident of Ohio and the defendant a resident of California.

In Hurtado, supra, California and Mexico were involved, but the place of the accident was California and Mexico had absolutely no interest to be protected by a refusal to apply California law. In other words the interests of the two governments showed upon analysis that Mexico was not at all interested by California was.

In Kasel v. Remington Arms Co., supra, again there were two states involved, California and Mexico. Mexico was the place of the wrong, but the plaintiff was a California resident and the defendant was a Delaware corporation with its home office in Connecticut. Again the court ruled that as between Mexico and California, California's law was the proper choice; Mexico had no interest to protect.

In Grant v. McAuliffe (1953) 41 Cal. 2d 859, 264 P. 2d 944, all the parties, plaintiff and defendant, were residents of California, and the accident occurred in Arizona; which was held not to have such an interest as should be given consideration when compared to the interest of California in its own residents. Virtually the same factual situation existed in Emery v. Emery (1955), 45 Cal. 2d 421, 289, P. 2d 218.

What distinguishes this case from those aforementioned is that we are really dealing with two distinct

torts. The particular tort of the Nevada defendant is separate from the tort which more proximately caused the plaintiff's injury, that of the Myers', the California residents. In the other cases, the tortious conduct and the injury occurred in the same state; which is generally so. Here the alleged tortious conduct of the Nevada defendant occurred in Nevada, while the accident and injury (and the second tort) occurred in California. While California may thus be treated as the "place of the wrong", actually and in reality the place of the wrong *insofar as the defendant's conduct is concerned* is the State of Nevada. That the injury occurred in California is in a sense fortuitous. (See Rest. 2d, Conflict of Laws, § 145, com. 2, p. 419.) This case is unique in that respect and we find no comparable case in California.

Looking outside California, we note three cases with similarity. In Cipolla v. Shasposka (1970), 439 Pa. 563, 267 A. 2d 854, the plaintiff automobile guest was a resident of Pennsylvania (the forum), while the defendant driver was a resident of Delaware where the accident and injury occurred. The court applied Delaware law whose guest statute denied recovery, a proper result under our governmental interest approach. But the distinguishing feature is obvious – the only interest of Pennsylvania was its resident plaintiff. In Williams v. Rawlings Truck Line, Inc. (1965), 123 U.S. App. D.C. 121, 357 F. 2d 581, the defendant's conduct took place in New York, where the plaintiff and defendant both resided; the accident and injury occurred in the District of Columbia (the forum). New York law was held to

apply, for the same reasons as were involved in Grant v. McAuliffe, *supra;* the place of the accident was wholly fortuitous and the case was treated as one of "false conflicts" (See Williams v. Rawlings Truck Lines, supra, p. 586.)

In Schmidt v. Driscoll Hotel (1957), 249 Minn. 376, 82 N.W. 2d 365, the forum state was Minnesota. Minnesota had a dram shop act which by statute imposed liability upon tavern owners for injuries sustained by third persons as a result of conduct of intoxicated persons who were furnished liquor in violation of a statute similar to the penal statutes of California and Nevada. Our court having construed Business and Professions Code, § 25602 as creating civil liability, we are in the same legal position as Minnesota. The defendant in Schmidt v. Driscoll Hotel served alcohol to one Sorrenson in violation of the statute. Sorrenson then proceeded to drive his vehicle, in which plaintiff was a passenger, into the State of Wisconsin where the automobile accident occurred, injuring the plaintiff. The question for the Minnesota court was which law to apply; its own, which gave civil liability against the defendant; or that of Wisconsin where the accident took place, but where there was no dram shop law. The case is similar on its facts to the case at bench both because of the dram shop aspect, and because the wrongful conduct and the injury were in different states. The differences are that both plaintiff and defendant were residents of the State of Minnesota, which is also the state where the wrongful act occurred. The only thing that happened in Wisconsin was the accident, which really was fortuitous; from the point of view of both

parties it could have happened anywhere.[7] The law of Minnesota was applied.

Thus even after looking outside California, we still find this case unique on its facts. The *Williams* and *Schmidt* cases are indicative of stress upon the state to the defendant's conduct as the source of the applicable law, because the ultimate place where the injury occurs is fortuitous. In Reich v. Purcell, supra, 67 Cal. 2d p. 556, 63 Cal. Rptr. p. 34, 432 P. 2d p. 730, Justice Traynor appears to support this emphasis when he states: "Missouri is concerned with conduct within her borders and *as to such conduct she has the predominant interest of the states involved.*" (Emphasis added). Here however we do not conclude that the Nevada conduct makes the Nevada interest predominant; for to do so would be to necessarily concede that the happening of the accident in California was fortuitous. From the plaintiff's point of view the occurrence of the accident in California was not fortuitous. This is where the plaintiff lives and where he has a perfect right to use the highways, expecting that duties and liabilities flowing from an accident will be governed by California law. To him, the place of dispensing liquor is fortuitous, not the place of the injury.

The governmental interests as we note them are sufficiently equal that we cannot say that the interest

[7] The Minnesota court cited but refused to follow the original Restatement rule of applying the law of the place of the wrong. The court uttered the following dictum at page 367: "But, even if at the time of the accident there had been in effect *in Wisconsin* a statute similar to § 340.95, *it is doubtful if it could be applied* to ascertain plaintiff's rights against defendant since there is nothing here to support a claim that defendant ever consented to be bound by Wisconsin law." (Emphasis added) The dubious reasoning destroys any precedential value the statement might otherwise have had.

of either state predominates. We find ourselves ambivalently wanting to apply California law for the benefit of our resident and wanting to apply Nevada law in order not to offend a sister state's concept of proper conduct of its citizens. We have concluded that the ambivalence is to be resolved by applying California law; we believe that this brings about both the more equitable and the legally correct result. We rely upon three precedents, whose rationale we accept, to justify such resolution of the conflict (which in our view is a true conflict of laws under which the interests of one state must suffer while those of the other be enhanced).

Our first authority is Kasel v. Remington Arms Co., supra, 24 Cal. App. 3d at p. 731, 101 Cal. Rptr. at p. 327, where the court states "the forum has a definite interest in applying its own law. The law of the forum, 'will be displaced only if there is a compelling reason for doing so.' It is 'applicable unless either the plaintiff or the defendant has been forced into a forum devoid of any such contact as would justify application of its own law.' Ehrenzweig, Conflict of Laws (1962) § 213, page 555." (See also Hurtado v. Superior Court, supra, 11 Cal. 3d p. 581, 114 Cal. Rptr. 106.) This is but another way of saying that if the interests are evenly divided between conflicting states, and if one of those states is the forum, the law of the forum should be applied. In this case that would be the law of California, because we do find that the interests of California and Nevada in this case are of equal dignity.

The second source of authority for our conclusion is in Restatement 2d, Conflict of Laws, section 146 which reads in part as follows: "In an action for a personal

injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the paritcular issue, some other state has a more significant relationship . . . to the occurrence and the parties, in which event the local law of the other state will be applied." Comment (e) to section 146 reads in part as follows: "On occasion, conduct and personal injury will occur in different states. In such instances, the local law of the state of injury will usually be applied to determine most issues involving the tort. . . . *One reason for the rule is that persons who cause injury in a state should not ordinarily escape liability imposed by the local law of that state on account of injury.*. . . .

The local law of the state where the personal injury occurred is most likely to be applied when the injured person has a settled relationship to that state, either because he is domiciled or resides or because he does business there." (Emphasis added).

Again comment (b) to section 156, Restatement 2d states in part: "If conduct and injury occur in different states, the local law of the state of injury will be applied unless some other state, which would usually be the place of conduct, has a more significant relationship to the occurrence and the parties with respect to the particular issue. . . . This is so for the reason, among others, that persons who cause injury in a state should not ordinarily escape liability imposed by the local law of that state on account of the injury." Illustration no. 1 under section 156 then furnishes facts very comparable to those of our case. It determines as we do that the interests of both states, the state of the action

and the state of the result, are equally important, but that neither is any greater than the other. The illustration concludes that the law of the place of injury should apply, saying " . . . ordinarily, at least, one should not be allowed to escape liability imposed upon him by the local law of the state where his act caused injury."

The same confirming language is to be found in the comments and illustration to Restatement 2d of Conflicts, section 159.

The third source of authority for our conclusion is to be found in the work of Professor Cavers and his principles of preference (see Cavers, The Choice of Law Process, page 139, et seq.) The first principle reads in appropriate part: "Where the liability laws of the state of injury set a higher standard of conduct . . . against injury than do the laws of the state where the person causing the injury has acted, . . . the laws of the state of injury should determine the standard . . . applicable to the case . . . " Referring to the plight of the defendant to whom this rule is applied, Professor Cavers states at page 141: "If he has not entered the state but has caused harm within it by his act outside it, then, save perhaps where the physical or legal consequences of his action were not foreseeable, it is . . . fair to hold him to the standards of the state to which he sent whatever harmful agent . . . caused the injury." Surely it is foreseeable to any dispenser of alcoholic beverages in Reno or the Nevada side of Lake Tahoe that an intoxicated customer may drive his automobile into adjoining California and injure a third person because of incompetent driving.

While the choice of law in this case is not clear, as it has been in others where application of governmental interests principles has resulted in an unequivocal indication of an interest in one state with a corresponding lack of interest in another state, we nonetheless are persuaded by the foregoing that the rule to be applied by California in this case is that one which favors California law and California public policy. We recognize the awkwardness of our ruling vis-a-vis the public policy of the State of Nevada. In that regard we emphasize that our ruling is not based upon the application of any "better law" concept, by which we would consider our law on this subject somehow wiser or "better" than that of Nevada (See Professor Seidelson's Analysis of this theory in 9 Duquense Law Review 428 to 434.) Our ruling is simply based upon what we consider to be sound legal authority, applicable where the governmental interests as expressed in Reich v. Purcell are equal.

WAS THERE A TORT?

[2] Despite our conclusion regarding choice of law, we find ourselves compelled to consider an argument regarding the substantive law applicable to this case. The argument states: in Vesely v. Cager, supra, liability of the dispenser of alcohol was founded upon a combination of Business and Professions Code section 25602 and Evidence Code section 669. The most serious question of concern to the court was whether the cafe proprietor owes a duty to care to the third person who is injured by the automobile accident brought about

by the negligence of the intoxicated patron. The court noted that a duty of care and the attendant standards of conduct required of a reasonable man may be found in a legislative enactment which does not expressly provide for civil liability; that negligence in presumed from the violation of a statute intended to protect a class of persons of which the plaintiff is a member against the type of harm which the plaintiff suffered as a result of the violation of the statute; and that the Legislature had codified this presumption in Evidence Code section 669. The Supreme Court then noted that Business and Professions Code section 25602 imposed the duty of care upon the defendant because it was adopted by the Legislature "for the purpose of protecting members of the general public from injuries . . . resulting from the excessive use of intoxicating liquor." (Vesely v. Sager, supra, 5 Cal. 3d p. 165, 95 Cal. Rptr. p. 631, 486 P. 2d p. 159.) The court's conclusion was fortified by citing Business and Professions Code, section 23001. Finding that the plaintiff was within the class of persons for whose protection section 25602 was enacted and that the injuries she suffered resulted from an occurrence that the statute was designed to prevent, the court concluded that the presumption of Evidence Code section 669 applies, provided that in addition there is in fact a violation of the statute and that it proximately causes injury to the plaintiff.

The argument proceeds: it is emphasized that the Vesely court specifically treated of the presumption of negligence embodied in Evidence Code section 669, together with the provisions of Business and Professions Code section 25602, and found a consequent duty

of the defendant to the plaintiff. It did not hold, and indeed could not hold that the defendant there violated a Nevada penal statute or any other state's penal statute. What do we then have where the defendant in the case before us has not violated section 25602 or any other California statute? What he violated was a Nevada statute which the Nevada Supreme Court has said creates criminal liability, but no civil liability.

The argument states further: in the case at bench, obviously there is no way that a Nevada resident, acting at all times in Nevada, could violate a penal statute of California. The only way therefore that the plaintiff can assert liability on the part of the defendant is to assert that defendant violated a statute of his own state, a penal statute, which in turn creates civil liability. Obviously if the California courts were to accept this, they would be telling the Nevada courts precisely the opposite of what the Nevada courts told the world regarding Nevada's own penal statute.

Thus the argument concludes that the plaintiff has stated no cause of action, not because of choice of law, but because there was no violation of a duty by the defendant to the plaintiff. Neither the California statute (which creates a civil duty) was violated by the defendant nor any Nevada statute creating a civil duty. So the defendant simply did not wrong the plaintiff.

The argument is logical and persuasive, and would have merit but for the fact that Vesely v. Sager, supra, went beyond pure statutory construction in its determination of liability. It reviewed the common law which had thertofore precluded civil liability of a dispenser of alcoholic beverages and overruled the cases enunciat-

ing that common law. The court stated, 5 Cal. 3d at p. 166, 95 Cal. Rptr. at p. 632, 486 P. 2d at p. 760: " . . . liability has been denied in cases such as the one before us solely because of the judicially created rule that the furnishing of alcoholic beverages is not the proximate cause of injuries resulting from intoxication. . . . this rule is patently unsound and totally inconsistent with the principles of proximate cause established in other areas of negligence law. Other common law tort rules which were determined to be lacking in validity have been abrogated by this court (see Gibson v. Gibson (1971), 3 Cal. 3d 914, 92 Cal. Rptr. 288, 479 P. 2d 648; Muskopf v. Corning Hospital Dist. (1961); 55 Cal. 2d 211, 11 Cal. Rptr. 89, 359 P. 2d 457), and there is no sound reason for retaining the common law rule presented in this case."

Thus the civil duty of the purveyor of alcoholic beverages spelled out in Vesely v. Sager arises not only from the statute but also from the common law of California as it now exists, and as it has existed from and after June 24, 1971, the date of the Vesely decision. On the date of the accident, July 24, 1971 defendant therefore owed a common law duty to the California plaintiff using California highways not to cause him injury by selling alcohol to an intoxicated person or known habitual drunkard. It was this duty that was violated according to the allegations of the first amended complaint.

The order sustaining demurrer and the judgment of dismissal are reversed.

RICHARDSON, P. J., and REGON, J., concur.

CERTIFICATE OF SERVICE

I hereby certify that on this..... day of July, 1976, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Frederick W. Stephenson, Esq., Suite 303, 901 H. Street, Sacramento, California 95814, Counsel for the Respondent. I further certify that all parties required to be served have been served.

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Supreme Court, U. S.
FILED
JUL 22 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 76-59

HARRAH'S CLUB,

Petitioner,

v.

RICHARD A. BERNHARD,

Respondent.

BRIEF OF THE STATE OF NEVADA, AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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INTEREST OF THE AMICUS

The Amicus, State of Nevada, has a direct interest in the matter before the Court, for the reason that the issues presented will be determinative of whether California law or Nevada law governs activities of Nevada citizens within the State of Nevada. The precise issue involves the extent to which California must give full faith and credit to Nevada decisions and statutes as they affect transactions occurring within the State of Nevada. The interest of the State of Nevada is a governmental interest arising from the obligations of state government to the citizens of the state.

ARGUMENT

The ultimate fact giving rise to the action for which certiorari is requested is that Harrah's Club, a Nevada corporation, through its employees, served alcoholic beverages to two California residents, the serving and consumption of the beverages taking place wholly within petitioner's business establishment located within the territorial limits of Nevada. Subsequent to the acts referenced above, the two California citizens returned to California and therein caused a motor vehicle accident which resulted in injury to Richard A. Bernhard, a California resident. However, if petitioner is guilty of any tortious act, such act was completed within the State of Nevada.

At the time of the events in question, neither California nor Nevada had a statute imposing civil liability on tavern keepers. Both states had statutes imposing criminal sanctions for serving obviously inebriated persons.[1] The supreme courts of both states had addressed the question of whether civil liability was imposed, either by implication from the existence of the criminal sanctions or by common-law principles. However, a direct conflict resulted from the fact that the California Supreme Court, in the case of *Vesely v. Sager*, 5 Cal.3rd 153, 486 P.2d 151 (1971), ruled that California tavern keepers were subject to civil liability arising from the act of serving obviously intoxicated persons, while the Nevada Supreme Court, in the case of *Hamm v. Carson City Nugget*, 85 Nev. 99, 450 P.2d 358 (1969), held that no such liability existed with respect to Nevada tavern keepers. Tavern keepers in Nevada were therefore possessed of the judicially-established right to pursue their business activities in Nevada free of the

[1]California Business and Professions Code § 25602; Nevada Revised Statutes 202.100 (repealed by Statutes of Nevada 1973, p. 1062).

necessity of procuring expensive liability insurance or risking ruinous exposure. This right of Nevada citizens to conduct business activities in Nevada pursuant to Nevada law was abrogated by judicial fiat of the California Supreme Court in an order of March 2, 1976.

In the March 2, 1976 decision, the California Supreme Court held that application of a test labeled the "comparative impairment test" enabled that court to determine that if the interest of California citizens are, in the court's opinion, greater than those of Nevada citizens, Nevada business entities and citizens can be compelled to comply with the "public policy" of California, notwithstanding the fact that the activities affected occur wholly within Nevada, and that Nevada law is contrary to California's policy. The California Supreme Court has, then, granted itself the power to disregard the Full Faith and Credit Clause and extend California law and "public policy" across into the State of Nevada, thereby affecting the right of Nevada citizens to pursue business activities within Nevada according to Nevada law. The fallacy of the California Supreme Court's position is patent.

Article IV, § 1 of the United States Constitution provides:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

The only exception to the mandate of Article IV, § 1 is found in the right of a state to adopt rules of conflicts of laws, and this right must be exercised subject to Article IV, § 1 and other constitutional limitations. *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 73 S.Ct. 856 (1953). In addition, the right to adopt conflict of laws rules is a right which extends only to rules having effect

within the forum state's borders and concerning affairs peculiar to the forum state. *Pink v. A.A.A. Highway Express*, 314 U.S. 201, 210, 62 S.Ct. 241, 246, 247 (1941).

The California Supreme Court has, then, rendered a decision which is clearly violative of the requirements of Article IV, § 1 and the decisions of this Court rendered with reference thereto. Moreover, the California Supreme Court has violated the foremost principle of conflicts established by this Court in *Western Union Telegraph Co. v. Brown*, 234 U.S. 542, 34 S.Ct. 955 (1914), that being, in the words of Justice Holmes, that:

> "Whatever variations of opinion there may have been, it is established as the law of this Court that when a person recovers in one jurisdiction for a tort committed in another, he does so on the grounds of an obligation incurred at the place of the tort that accompanies the person of the defendant elsewhere, and that is not only the ground but the measure of the maximum recovery."

The case *sub judice* presents the grave constitutional issue of what limitations restrict a state supreme court in refusing to grant full faith and credit to the laws of sister states. This issue is of extreme importance to all states of the Union, since, unless definitive guidance is forthcoming from this Court, state supreme courts, using the convenient logic of the California Supreme Court, will be free to invade sister states and, under the conflict of laws banner, impose forum state policies on such sister state's citizens. That such fear is not foundation is revealed in other recent decisions of the California Supreme Court.[2] That is to say, state supreme courts will be empowered to entirely disregard the Full Faith and Credit Clause under the guise of the conflict of laws exception to such clause.

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[2]See: *Hall v. University of Nevada*, 8 Cal.3d 143, 545 P.2d 246 (1972), wherein the California Supreme Court clearly reveals that it intends to give little or no effect to Nevada's statutory waiver of sovereign immunity or the limitations thereon, when in footnote 4 the Court states:

> "***Since we conclude that Nevada does not have immunity from liability for its activities in California, the extent to which Nevada has waived immunity by statute and the extent, if any, to which it can or has limited the statutory waiver is immaterial. Even if we assume that Nevada limited its statutory waiver of immunity to action in its courts, such limitation would not be applicable to the instant case involving activities in California because the sovereignty of one state does not extend into the territory of another."

It should also be noted that the concluding sentence in the Court's footnote is rather ironic in light of California's decision to impose its sovereignty in Nevada in the present case.

In addition, See: *Cornelison v. Chaney*, 16 Cal.3d 143, 545 P.2d 264 (1976), wherein the California Supreme Court ruled that a California superior court could properly accept jurisdiction over an action arising out of a motor vehicle accident which occurred in Nevada and which involved a Nebraska and California resident, on the ground that the Nebraska resident routinely engaged in interstate commerce in California and "the accident occurred not far from the California border, while defendant was bound for this state."

When questions arise concerning the applicability of and limitations on the Full Faith and Credit Clause, this Court is the final arbiter. *Johnson v. Muelberger*, 340 U.S. 581, 71 S.Ct. 474 (1951); *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 64 S.Ct. 208 (1943). The case presently before the Court squarely presents a situation where a state court has decided a federal question of substance to all the states of the Union in a manner which directly conflicts with the Constitution of the United States and the applicable decisions of this Court. Moreover, no definitive decisions on the limits to which the conflicts of laws exception to the Full Faith and Credit Clause may be extended have been forthcoming from this Court for approximately 20 years. It is obvious from the broad and startling ramifications of the decision of the California Supreme Court that direction and clarification is now required and the petition for certiorari should be granted.

CONCLUSION

This Court is the final arbiter of issues involving the Full Faith and Credit Clause of the United States Constitution. The case *sub judice* presents a question concerning the Full Faith and Credit Clause which requires the Court to exercise its powers as arbiter in order to resolve an important conflict.

Respectfully submitted,

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